STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals,
Owens, P.J, Murphy, and Hoekstra, J.J.

TERIDEE LLC, a Michigan limited liability company; THE JOHN F. KOETJE TRUST, u/a/d 5/14/1987, as amended; and THE DELIA KOETJE TRUST, u/a/d 5/13/1987, as amended,

Plaintiffs/Appellees,

v

CLAM LAKE TOWNSHIP, a Michigan municipal corporation; and HARING CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendants/Appellants.
_____/

Supreme Court Docket No. 153008

Court of Appeals Docket No. 324022

Wexford County Circuit Court
Case No. 13-24803-CH
Hon. William M. Fagerman

BRIEF ON APPEAL – APPELLANTS
ORAL ARGUMENT REQUESTED

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ORDER APPEALED FROM/RELIEF SOUGHT

Appellants, Clam Lake Township ("Clam Lake") and the Charter Township of Haring ("Haring") (collectively, "Townships"), are appealing the September 19, 2014 "Opinion and Order on Motion for Summary Disposition" of Judge William M. Fagerman of the Wexford Circuit Court in Case No. 13-24803-CH, which was entered by the circuit court on September 22, 2014 (Appendix, 25a-40a), and which was affirmed by the Court of Appeals in an unpublished opinion entered on December 8, 2015 (*id.*, 42a-48a). The effect of the lower courts' opinions was to declare invalid an Agreement for the Conditional Transfer of Property (aka, "Act 425 Agreement"), which the Townships had entered pursuant to Act 425 of 1984 ("Act 425"), MCL 124.21, *et seq*. The principal substantive basis of the lower courts' decisions was that the development standards of the Act 425 Agreement unlawfully restrict Haring's legislative zoning authority by contract.

The Townships are seeking reversal of the lower court decisions, and a concurrent declaration that (a) the Act 425 Agreement is valid and enforceable, and thus prohibits any annexation of the Transferred Area, (b) the attempted annexation of the Transferred Area by TeriDee, LLC is void, and (c) the Transferred Area has been continuously within Haring's jurisdiction since June 10, 2013, when the Townships' Act 425 Agreement became effective.

BASIS OF JURISDICTION

This Court has jurisdiction to consider and decide the Townships' appeal pursuant to 1963 Mich Const, art. VI, §4; MCL 600.215; and, MCR 7.303(B)(1). Leave to Appeal was granted by way of Order entered by this Court on April 6, 2016. Appendix, 50a.

STATEMENT OF QUESTIONS PRESENTED

In the Order granting the Townships' Application for Leave to Appeal, the Court ordered the parties to brief the following questions:

I. Is the Townships' Agreement pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425 ("Act 425"), MCL 124.21, *et seq*. ("Act 425 Agreement"), void because certain provisions of the Agreement contracted away Haring Township's legislative zoning authority?

A. The circuit court answered, "Yes."

B. The Court of Appeals answered, "Yes."

C. The Townships answer, "No."

C. TeriDee would answer, "Yes."

II. If the Townships' Act 425 Agreement is invalid, are the offending provisions severable?

A. The circuit court answered, "No."

B. The Court of Appeals answered, "No."

C. The Townships answer, "Yes."

D. TeriDee would answer, "No."

III. Are the challenged provisions of the Act 425 Agreement authorized by Section 6(c) of Act 425, MCL 124.26(c)?

A. The circuit court answered, "No."

B. The Court of Appeals answered, "No."

C. The Townships answer, "Yes."

D. TeriDee would answer, "No."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. Introductory Overview

Clam Lake and Haring approved an Agreement for the Conditional Transfer of Property (aka, "Act 425 Agreement") on May 8, 2013, pursuant to Act 425 of 1984 ("Act 425"), MCL 124.21, *et seq*. Appendix, 292a-327a. The Act 425 Agreement became effective on June 10, 2013, when it was signed by each Township and filed with the County Clerk and Secretary of State. *Id*. The Townships later adopted a First Amended Act 425 Agreement (*id*., 428a-443a), which took effect on October 21, 2013, and also adopted a Second Amended Act 425 Agreement (*id*., 480a-485a), which took effect on March 14, 2014. The fully-Amended Agreement (i.e., as amended by the First and Second Amendments) was in effect at the time of the lower courts' final decisions in this case.

The effect of the Act 425 Agreement is to transfer an area of contiguous land, located on the Clam Lake/Haring border (i.e., the "Transferred Area"), from the jurisdiction of Clam Lake to the jurisdiction of Haring, for a period of 20 years, for the purpose of facilitating an economic development project thereon. As discussed *infra*, Haring is better suited than Clam Lake to foster economic development on the Transferred Area because Haring has its own public water and public sewer systems, and also has its own zoning ordinance to regulate development, whereas Clam Lake does not provide sewer or water service, and does not have its own zoning.

Plaintiffs collectively own most of the undeveloped portion of the Transferred Area, consisting of about 140 acres. Pls'Amd Compl at ¶13. Plaintiffs are not parties to the Act 425 Agreement, nor do they have any third-party rights under the Agreement – this is undisputed. But Plaintiffs oppose the Act 425 Agreement because they would instead prefer to have their property annexed into the City of Cadillac. *Id*. at ¶15. Plaintiffs cannot, however, have their property annexed into the City while the Act 425 Agreement is in effect, because this would be prohibited by Section 9 of Act 425, MCL 124.29 ("While a contract under [Act 425] is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.").

Consequently, Plaintiffs filed this action in the Wexford County Circuit Court, seeking to have the Act 425 Agreement declared invalid, so that they could petition the State Boundary Commission ("SBC") for annexation of their property into the City.

Plaintiffs' principal argument is that the development standards of Art. I, §6 of the Agreement unconstitutionally restrict Haring's legislative authority to zone the Transferred Area, by contract.[1] Pls' Amd Compl at ¶¶50-54, 68-73. The circuit court agreed and thus voided the Act 425 Agreement, and the Court of Appeals affirmed, thus giving rise to this Application. The material facts and procedural history that are relevant to the appeal are presented below.

B. The Townships' Act 425 Agreement

As a predicate to considering the terms of the Townships' Act 425 Agreement, it is useful to first review the pertinent provisions of the Act 425 statute, under which the Agreement was developed. In general terms, Act 425 allows two "local units"[2] to conditionally transfer a designated area of land from one jurisdiction to the other, by contract, for a specified period of time, not to exceed 50 years. MCL 124.22(1). The Legislature has made the intentional policy decision that Act 425 agreements are always preferable to annexation, and so has directed that, where an Act 425 agreement is in place, an annexation of the same lands "shall not take place." *See* MCL 124.29.

An Act 425 agreement is to be "for the purpose of an economic development project," the implementation of which is *required* to be "controlled by a written contract agreed to by the affected local units." MCL 124.22(1). Act 425 defines an "economic development project," as follows:

[1] This claim is set forth in Count II of Plaintiffs' First Amended Complaint. In Count I, Plaintiffs allege that the Agreement does not satisfy the requirements of the Act 425 statute. The circuit court dismissed Count I in preliminary proceedings, under the primary jurisdiction doctrine, holding that the State Boundary Commission ("SBC") should resolve that issue. The SBC ultimately found that the Agreement is invalid under Act 425 because it allegedly "fails to promote economic development." These bifurcated proceedings have given rise to a separate appeal that is already pending before this Court in *Clam Lake, et al v State Boundary Commission, et al*, S. Ct. Docket No. 151800.

[2] "'Local unit' means a city, township, or village." MCL 124.21(b).

> "Economic development project" means land and existing or planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water. Economic development project includes necessary buildings, improvements, or structures suitable for and intended for or incidental to use as an industrial or commercial enterprise or housing development; and includes industrial park or industrial site improvements and port improvements or housing development incidental to an industrial or commercial enterprise; and includes the machinery, furnishings, and equipment necessary, suitable, intended for, or incidental to a commercial, industrial, or residential use in connection with the buildings or structures. MCL 124.21(a).

The Townships' Agreement has the purpose of a two-fold economic development project. First, the Agreement *requires* the extension of Haring wastewater and water services to the Transferred Area, to facilitate economic development thereon. Appendix, 297a-298a (§§ 3 and 4(a)).[3] Second, it allows the owners of the undeveloped portion of the Transferred Area to seek rezoning of those same lands to a mixed-use, commercial/residential planned unit development district ("PUD"), so as to allow development in accordance with the principles of planned unit development and the recommendations of the *Cadillac Area Corridor Study* (hereafter, "*Corridor Study*").[4] This is all independently specified in Art. I, §3 of the Townships' Agreement:

> "The Transferred Area is proposed for the implementation of an economic development project under Act 425, with said economic development project consisting of two aspects, as follows: (a) the construction of a mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Cadillac Area Corridor Study* (September 1999), in order to balance the property owners' desire for commercial use with the need to protect the interests of surrounding residential property owners; and, (b) the provision of public wastewater services and public water supply services to the Transferred Area, so as to foster the new mixed-use, commercial/residential development and to provide for the protection of the environment, including, but not limited to, protection of ground water and surface water on and below the Transferred Area." *Id*., 482a-483a (§3).

Insofar as this appeal is concerned, it is only the secondary aspect of the Townships' planned

[3] In their own Complaint, Plaintiffs expressly admit that the Agreement "***requires*** Haring . . . to provide public wastewater and public water supply services to the Transferred Area for the entire term of the . . . Agreement. *See* Pls'Amd Compl at ¶59 [emphasis added].

[4] The *Corridor Study* is discussed in further detail below.

economic development project (i.e., the mixed-use PUD development standards) that forms the basis of Plaintiffs' challenge to the Agreement. More specifically, Plaintiffs argue that Art. I, §6 of the Agreement allegedly divests Haring, by contract, of its legislative authority to zone the Transferred Area. Pls' Amd Compl at ¶¶50-54, 68-73. Accordingly, the plain terms of Art. I, §6 are discussed below, along with the Townships' interpretation and implementation of that same provision.

C. The Development Standards of Article I, §6 of the Agreement

Article I, §6 of the *original* Act 425 Agreement created, on its face, a zoning scheme that established a baseline agreement between the Townships for how the Transferred Area ought to be developed, while at the same time preserving Haring's legislative zoning authority to determine the final content of the development standards that could be applied to the Transferred Area. It did this through what might be described as a three-phase approach, as follows:

1. Phase I – Zoning Upon Initial Transfer. Phase I was the initial transfer of the Transferred Area, upon which the residual zoning of the Transferred Area was completely unchanged. It was left subject to the existing "FR" zoning, as it was already zoned in Clam Lake's jurisdiction, under County zoning regulations. Appendix, 300a (§6.a).

2. Phase II – Baseline Zoning. In Phase II, Haring was then to (a) rezone the portion of the Transferred Area that is already developed for residential housing to the Haring zoning district that is most comparable to the County FR zoning, so that there would be no effective change in the pre-existing County zoning (*id*., 301a [§6.a.1]), and (b) make "reasonable efforts" to adopt specified mixed-use PUD development standards into its existing PUD zoning district, so that the landowners could apply for rezoning to that district reasonably in advance of the date when Haring was scheduled to extend public sewer and water to the Transferred Area, in the spring of 2015 (*id*., 301a [§6.a.2]; 310a-311a [§6.b]).

3. Phase III – Preservation of Authority To Amend. Phase III constituted a preservation of Haring's legislative authority to *amend* the zoning and/or development standards for the Transferred Area, any time after Phase II had been completed. This was accomplished by Article I, §6.c of the Agreement, which states as follows:

> "c. After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, **the Transferred Area shall be subject to Haring's Zoning Ordinance** and building codes as then in effect or **as subsequently amended**." *Id*., 311a (§6.c). [Emphasis added].

The Townships' purpose and intent of including Article I, §6.c in the Agreement was to specifically and expressly preserve Haring's independent legislative authority to amend the zoning regulations that could be applied to any or all portions of the Transferred Area, after the mixed-use PUD standards had initially been adopted in Phase II (i.e., to allow Haring to "subsequently amend[]" the zoning "[a]fter such amendments to the Haring zoning ordinance" had been made). This was done so that there would be no ongoing restriction on Haring's legislative authority to zone or re-zone the Transferred Area, and/or to amend the mixed-use PUD development standards. As explained below, it is undisputed that this was each of the Townships' specific intent.

At their February 10 and February 11, 2014 Board meetings, respectively, the Haring and Clam Lake Boards adopted concurring resolutions, setting forth their original and ongoing intent to interpret and apply Art. I, §6 of the Agreement in a manner by which Haring has independent legislative authority to determine the final content of the zoning regulations that can be applied to the Transferred Area. Specifically, the Clam Lake Board unanimously resolved as follows:

> "NOW, THEREFORE, BE IT HEREBY RESOLVED AS FOLLOWS:
>
> 1. "The Clam Lake Township Board hereby states and confirms that it was Clam Lake's original intent that Article I, Section 6 of the Act 425 Agreement should and shall be interpreted as giving Haring the independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area.

2. "It is the intention of the Clam Lake Township Board to continue to interpret and apply Article I, Section 6 of the Amended Act 425 Agreement consistent with the interpretation stated in paragraph 1 above, so that Haring has independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area." *Id*., 475a-478a.

And the Haring Board concurrently resolved, unanimously, in like terms:

"NOW, THEREFORE, BE IT HEREBY RESOLVED AS FOLLOWS:

1. "The Haring Township Board hereby states and confirms that it was Haring's original intent that Article I, Section 6 of the Act 425 Agreement should and shall be interpreted as giving Haring the independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area.

2. "It is the intention of the Haring Township Board to continue to interpret and apply Article I, Section 6 of the Amended Act 425 Agreement consistent with the interpretation stated in paragraph 1 above, so that Haring has independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area." *Id*., 459a-462a.

Therefore, based on the trial court record, it is undisputed that the specific intent of the only parties to the Agreement (i.e., the Townships) was to interpret and apply the plain language of the Agreement in a manner that preserved Haring's legislative authority to determine the content of the zoning regulations that can be applied to the Transferred Area.

Turning then to the specific development standards listed in Art. I. §6.a.2 of the Agreement, these standards constitute what are commonly known in the land-use planning profession as "form-based" development standards. As the name implies, "form-based" development standards are concerned with "the form of the built environment and not as much . . . what goes on inside the built environment." Schindler, Kurt H., Senior Land Use Educator, Michigan State University Extension, *Advantages of Form-Based Zoning Account for its Growing Popularity* (October 24, 2012). In other words, it is not so much the specific uses allowed that matters; it is the *form* of the allowed uses that matters, so as to ensure the "shaping of a high quality public realm." *Id*. Consistent with this concept, it can be seen that Art. I. §6.a.2 of the Agreement does not identify or require any specific

uses, except to allow a mix of unspecified commercial use and residential use, in certain proportions. Appendix, 301a. It is undisputed that the specific uses to be allowed on the Transferred Area were left to Haring's sole discretion.

It should be noted that these particular form-based development standards did not appear out of the ether. They are based on the recommendations of the *Corridor Study* (*id*., 236a-290a), which is a regional planning document that was jointly prepared by Haring, Clam Lake and the City of Cadillac in 1999 (*id.*, 240a), in preparation for the construction of the new US-131 bypass to the east of the City. The purpose of the *Corridor Study* was to "examine enhancement needs and opportunities for the future US-131 Business Route, associated M-55 and Boon Road segments, *and the new freeway interchanges*." *Id.* [emphasis added].[5]

Included in the Appendix (*id*., 567a-569a) is a list of some of the principal recommendations of the *Corridor Study*, followed by an identification of the parallel design standards that were incorporated into the original Agreement. As this comparison demonstrates, nearly every design standard of the Agreement is founded upon a specific recommendation of the *Corridor Study*. Stated another way, the design standards of the Agreement were not a product of Clam Lake foisting its zoning preferences on Haring by contract. To the contrary, those design standards are a product of Haring's *own* land use plan for the Highway U.S.-131 interchanges, as reflected in the *Corridor Study*, which Haring approved over a decade before the Agreement even existed.

D. First Post-Lawsuit Amendment of Agreement

Plaintiffs filed their lawsuit on August 13, 2013. And, admittedly, at that time, there *might* have been some merit to Plaintiffs' challenge to Art. I, §6.a.2 of the Agreement, for the reason that the Agreement, *as it existed at that time*, could have been construed as contractually requiring

[5] In other words, the *Corridor Study* was meant to apply, specifically, to the Transferred Area, which is located at the U.S.-131/M-55 interchange.

Haring to adopt (at least initially) the "minimum PUD development regulations" standards that were then-stated in Art. I, §6.a.2. But it is undisputed that that did not happen. Haring *never* adopted the "minimum" PUD standards stated in Art. I, §6.a.2 of the *original* Agreement.

Instead, the parties amended the Agreement, *after* Plaintiffs had filed suit, so that Art. I, §6.a.2 would reflect materially-different PUD development regulations that Haring had independently developed on its own, and had already adopted into its own zoning ordinance in the interim, *before* these standards ever appeared in the amended Agreement. In the words of Plaintiffs' own legal counsel, the Townships "swapped" out and replaced the mixed-use PUD regulations of the original Agreement (as stated in Art. I, §6.a.2) with the materially-different mixed-use PUD regulations that Haring had already adopted on its own, through an exercise of its own independent legislative authority. *See id*., 937a; 961a. In doing so, the Townships thus mooted Plaintiffs' challenge to Art. I, §6.a.2 of the Agreement because Art. I, §6.a.2 then required Haring to do *nothing* whatsoever (i.e., Haring could not be contractually bound to adopt what it had already adopted).

This legally dispositive fact was entirely missed (and not even mentioned) by both the circuit court and the Court of Appeals. And so as to ensure that this manifest error does not occur again, the Townships emphasize below the detailed process by which Art. I, §6.a.2 – *as it was in effect at the time of the lower courts' decisions* – came to reflect design standards that were independently developed by Haring on its own, and which were already adopted into the Haring zoning ordinance, *before* the current version of the Agreement ever took effect.

1. Haring Develops Its Own Version of Mixed-Use PUD Regulations

Shortly after the original Agreement took effect, Haring promptly commenced the legislative process of independently reviewing the development standards of the Agreement. It is undisputed that Haring then materially revised those standards before incorporating them into its own zoning ordinance, in accordance with its own legislative discretion. This was a product of the combined

action of the Haring Planning Commission and the Haring Township Board, as shown below.

The Haring Planning Commission ("PC") performed a preliminary review of the development standards at a meeting on July 16, 2013 (*id*., 331a-332a), during which the PC suggested several changes, including some changes that had been requested by Plaintiffs and their counsel, who attended the meeting (*id*.). The Haring PC selected the uses to be allowed in the new mixed-use PUD District, because this subject is not even addressed in the Act 425 Agreement. The Haring PC then considered a revised draft ("Alternate Draft No. 2") (*id*., 334a-346a) of the PUD regulations at a meeting on July 30, 2013 (*id*., 348a-349a), during which the PC requested further revisions, and then scheduled the further revised version for public hearing. The Haring PC then conducted a public hearing on Alternate Draft No. 3 (*id*., 351a-362a) on August 20, 2013, and recommended that the revised version be adopted and approved by the Board. *Id*., 364a-365a. On August 26, 2013, the Haring Board accepted Alternate Draft No. 3, on first reading. *Id*., 367a. On September 9, 2013, the Haring Board adopted Alternate Draft No. 3, on second reading. *Id*., 369a-370a. These amended PUD regulations were then codified into Chapter 4 of the Haring Zoning Ordinance. *Id*., 373a-390a.

The end result is that Haring was not restricted, at all, by the development standards of the original Agreement. Instead, Haring revised those standards in several material respects, including by making changes that were requested by Plaintiffs. The specific changes included the following:

- Haring designated the uses that are allowed in the District, which is a subject matter that is not even addressed by the Agreement, as stated in subsection 3(b).[6]
- Haring allowed front building facades to have a lower percentage of glass, as stated in subsection 3(d)(3)(v).

[6] In this table, the Townships are referring to subsections of Section 422 of the Haring zoning ordinance, as reflected in Appendix, 373a-390a.

- Haring removed certain screening requirements for rear building facades that face US-131, as stated in subsection 3(d)(3)(xii). **This change was made at Plaintiffs' request**.[7]

- Haring removed the prohibition on exterior neon, LCD and LED lights, and instead allowed such lighting, subject to regulation, as stated in subsection 3(d)(3)(xiv). **This change was made at Plaintiffs' request**.

- Haring removed the requirement for preservation of certain existing frontage trees, as had previously been stated at subsection 3(e)(3).

- Haring removed certain screening requirements for parking lots that face US-131, as stated in subsection 3(a)(5)(i). **This change was made at Plaintiffs' request**.

- Haring removed certain screening requirements for certain service or loading bay doors that face US-131, as stated in subsection 3(e)(6). **This change was made at Plaintiffs' request**.

- Haring allowed exceptions to curbing requirements in parking lots and paved areas, as stated in subsection 3(e)(7). **This change was made at Plaintiffs' request.**

- Haring eliminated the prohibition on outdoor storage and display, and instead allowed outdoor storage and display, subject to regulation, as stated in subsection 3(e)(8). **This change was made at Plaintiffs' request**.

- Haring eliminated the greenbelt requirement for US-131, as stated in subsection 3(e)(10). **This change was made at Plaintiffs' request**.

- Haring eliminated the 100-foot setback requirement for buildings along US-131, as had been previously stated in subsection 3(e)(12).

When the Board members were subsequently deposed (more on this subject later), it was confirmed that Clam Lake officials were wholly uninvolved in making these changes. *Id*., 618a-619a (Payne); 645a-646a (Peterson); 762a (Kitler); 886a-887a (Baldwin); 927a-928a, 930a (Fagerman). The only Clam Lake official who offered any comment on the revised regulations was Dale Rosser, the Clam Lake Supervisor. But his comments were rejected by Haring. Specifically, Mr. Rosser voiced the concern that he would prefer if the US-131 screening requirements were not

[7] Trustee Fagerman testified as to the nature of the changes that TeriDee requested be made to the PUD zoning regulations, which are also noted above, in bold. *Id*., 929a-930a (Fagerman). She has personal knowledge of this, because she was the Board representative on the Planning Commission, at the time. *Id*., 926a-927a.

removed, but Haring removed them anyway. *Id.*, 691a-692a (Rosser); 887a (Baldwin). As noted above, the only third-parties who had any material input on the changes to the PUD regulations were Plaintiffs – and most of their requests were satisfied.

2. First Amendment to Act 425 Agreement

After Haring had satisfied most of Plaintiffs' concerns about the development standards through an exercise of its own independent zoning authority, the Townships thereafter amended Art. I, §6.a.2 of the Agreement (*id.*, 428a-443a) so as to "swap" out and replace the original standards with the independently-developed Haring standards. This was accomplished through the following steps: (a) the Haring Board adopted a resolution on September 9, 2013, approving the First Amendment (*id.*, 392a-408a); (b) the Clam Lake Board adopted a resolution on September 18, 2013, approving the First Amendment (*id.*, 410a-426a) and, (c) the First Amendment became effective October 21, 2013, upon filing with the Wexford County Clerk and Secretary of State, Office of the Great Seal. *Id.*, 428a-443a. As a result of these procedures, the Act 425 Agreement (as it was reviewed by the lower courts) reflected the same development standards that Haring had already legislatively approved and adopted on its own, *before* the First Amendment took effect.

E. Initial Summary Disposition Proceedings

At the time when the above steps had already been completed, the circuit court considered the Townships' initial motion for summary disposition. Insofar as Count II is concerned, that motion argued that the contested provisions of Art. I, §6 of the Agreement did not contractually bind Haring, on their face or in their application, or alternatively, that these same provisions were authorized by MCL 124.26(c). The circuit court denied the Townships' motion for summary disposition on Count II in a written Opinion and Order entered on December 20, 2013, holding that

discovery was appropriate in order to resolve Count II. *Id.*, 6a-18a.[8] In pertinent part, the circuit court explained that discovery was appropriate so that Plaintiffs would have an opportunity to determine whether "defendants were carrying out the agreement in a way that did not divest [Haring] of its legislative zoning authority." *Id.*, 43a. The circuit court also held discovery could occur, relative to whether the zoning provisions of the Agreement are severable. *Id*.[9]

F. Discovery – Board Member Depositions

After entry of the circuit court's December 20, 2013 Opinion and Order, Plaintiffs engaged in discovery, including making requests for depositions of all Township Board members of both Townships. The Townships objected to this and sought a protective order to prohibit such depositions, on the legal basis that the Township Boards speak only as a whole, such that the testimony of any individual Board member about any aspect of the Agreement was irrelevant. After a contested hearing on the matter, the circuit court entered an order on May 13, 2014, allowing Board member depositions to occur, but subject to a protective order. *Id*., 20a-23a. The Board member depositions ultimately occurred. The testimony of the Board member depositions is discussed below, in other sections of this Appellants' Brief.

G. Further Implementation of Agreement

It is undisputed that Haring *continued* to exercise its independent zoning authority over the Transferred Area, by further amending its mixed-use PUD regulations, after entry of the circuit court's December 20, 2013 Opinion and Order. *Id*., 522a-554a. These amendments deviated even further from the development standards that were included in the original Agreement, making them less restrictive in some respects, and adding many new provisions that are not addressed in the

[8] The circuit court did, however, grant the Townships' motion for summary disposition on Count I. *See* footnote 2, *supra*.

[9] The severability issue was deemed relevant because the Townships had offered the alternative argument, in support of their motion for summary disposition, that even if the development standards of the Act 425 Agreement are invalid, they are nonetheless severable.

Agreement, at all. *Id*. The changes made by the amendments include the following:

- Haring gave itself the discretion to increase the maximum percentage of commercial use from 60% to 65%, as stated in subsection 3(c)(1).[10]
- Haring gave itself the discretion to increase the permitted density of residential development from 4 units/acre to 8 units/acre, as stated in subsection 3(c)(2).
- Haring added a new requirement for underground utilities, consistent with the *Corridor Study*, as stated in subsection 3(c)(5).
- Haring added a new standard for maximum building height, consistent with the *Corridor Study*, as stated in subsection 3(d)(3)(ii).
- Haring increased the flexibility with regard to commercial architecture standards, as stated in subsections 3(d)(3)(iii)-(v).
- Haring clarified that gas stations are not allowed in the district, as stated in subsection 3(d)(3)(xiii).
- Haring amended the large parking lot landscaping standards, for consistency with the *Corridor Study*, as stated in subsection 3(e)(5)(ii).
- Haring made the greenbelt width and planting standards consistent with the *Corridor Study*, as stated in subsection 3(e)(10).
- Haring adopted new standards for street light poles, consistent with the *Corridor Study*, as stated in subsection 3(f)(3).
- Haring adopted new signage provisions that provided for pylon signs, as stated in subsection 3(g). **This change was made at Plaintiffs' request**.
- Haring adopted access management standards that are consistent with the *Corridor Study*, as stated in subsection 3(h).

These amendments were first considered by the Haring PC on January 21, 2014, at which time the PC decided that these amendments should be adopted for the purpose of more fully implementing the recommendations of the *Corridor Study*, as reflected in the minutes of that meeting. *Id*., 445a-447a. At its next meeting on February 18, 2014, the Haring PC conducted a public hearing on the proposed amendments (*id*., 492a-506a) and then recommended them to the

[10] In this table, the Townships are referring to subsections of Section 422 of the Haring zoning ordinance, as reflected in the amending ordinance that the Township adopted on March 14, 2014. *Id*., 522a-554a.

Haring Board for adoption. *Id*., 508a-509a.

Plaintiffs were once again invited to attend the public hearing in order to provide their input on the proposed amendments (*id*., 487a) and Plaintiffs' attorney did, in fact, submit written comments on the proposed amending ordinance (*id*., 489a-490a). Notably, the PC revised the proposed amending ordinance in specific response to Plaintiffs' concerns about the proposed prohibition on pylon signs (*id*.), by providing the PC with discretionary authority to permit a pylon sign in appropriate circumstances. This is reflected in the PC minutes (*id*., 508a), and also in Section 422.3(g)(2) of the amending ordinance (*id*., 532a). On March 10, 2014, the Board conducted its first reading of the zoning amendments (*id*., 516a), and then adopted them at a meeting on March 14, 2014 (*id*., 520a). The amendments became effective on March 24, 2014, seven days following publication on March 17, 2014. *Id*., 556a-558a.

The minutes of each Haring PC and Haring Board meeting at which the zoning amendments were considered and adopted (*id*., 508a-509a; 516a-518a; 520a) reflect that not a single public official from Clam Lake attended or provided verbal or written comment on the amendments. And to the contrary, the minutes of the PC's January 21, 2014 meeting reflect the advice from legal counsel that "Clam Lake concurs in the position that Haring has the right to amend the mixed-use PUD regulations under the Act 425 Agreement, without Clam Lake's approval." *Id*., 446a. Furthermore, as shown above, the revisions that the Haring PC made to the proposed amendments were made in direct response to Plaintiffs' concerns. The Board member depositions further confirm that Clam Lake officials were completely uninvolved in the process. *Id*., 618a-619a (Payne); 645a-646a (Peterson); 762a (Kitler); 886a-887a (Baldwin[11]); 927a-928a, 930a (Fagerman).

[11] Trustee Baldwin was the Board representative on the PC at the time that Haring processed and approved these amendments to the PUD regulations. *Id*., 883a.

H. Second Post-Lawsuit Amendment to Act 425 Agreement

In conjunction with Haring's adoption of amended mixed-use PUD development standards in its zoning ordinance, the Townships also approved a second amendment to the Agreement (the "Second Amendment"). *Id*., 480a-485a. The Second Amendment was approved by Haring on February 10, 2014 (*id*., 449a-457a) and by Clam Lake on February 11, 2014 (*id*., 464a-473a). The Second Amendment became effective on March 14, 2014, upon signing by the Supervisor and Clerk of each Township, and upon filing with the Wexford County Clerk and Secretary of State, Office of the Great Seal, in accordance with MCL 124.30. *Id*., 480a-481a.

The principal change effectuated by the Second Amendment is that it adds a specific savings/severability clause at Art. I, §6.d of the Agreement, stating as follows:

> "d. *Savings/Severability Clause*. If a court or administrative agency of competent jurisdiction finds that the zoning provisions of this Section 6 are invalid for reason of constituting an unlawful infringement or restriction upon Haring's legislative zoning authority, then Haring and Clam Lake agree as follows:
>
> "(i) Upon such a finding, Section 6 shall, automatically and without further action by the parties, be interpreted and applied as requiring only that Haring comply with Section 504(3) of the Michigan Zoning Enabling Act, MCL 125.3504(3), when Haring receives a request for approval of a mixed-used commercial/residential PUD on the undeveloped portion of the Transferred Area. The parties' intention is that Haring's compliance with said statute will promote the type of planned "economic development project" that is envisioned by Section 3 of this Agreement.
>
> "(ii) Such a finding shall not invalidate the other provisions of this Agreement, which shall remain binding and fully enforceable, in concert with Art. I, Section 6.d(i)." *Id*., 483a.

With regard to the citation, in the above-quoted Savings/Severability clause, to MCL 125.3504(3), that particular provision of the Michigan Zoning Enabling Act states as follows:

125.3504 Regulations and standards governing consideration and approval of special land uses and planned unit developments

* * *

(3) A request for approval of a land use or activity **shall be approved** if the request is in compliance with the standards stated in the zoning ordinance, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes. MCL 125.3504(3) [emphasis added].

Thus, in the event that the development standards of Art. I, §6 of the Agreement were invalidated, Art. I, §6.d(i) would then require that Haring comply with the applicable State law when reviewing an application for a mixed-used commercial/residential PUD for the Transferred Area, to wit, by approving the application, as required by MCL 125.3504(3), if the application "is in compliance with the standards stated in the zoning ordinance, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes."

The Court should consider the specific temporal and factual context that existed when the savings/severability clause was adopted into Art. I, §6.d of the Agreement. Specifically, this was done nearly a year after the Townships first started to develop their original Agreement. And by that very late juncture, Haring had already independently adopted, into its own zoning ordinance, mixed-use PUD regulations for the Transferred Area that were consistent with the *Corridor Study*. In addition, by that very late juncture, Haring had already adopted Master Plan provisions which specified that the Transferred Area was to be developed as a mixed-use PUD in accordance with the recommendations of the *Corridor Study*.[12] In other words, Haring's *own* zoning and land use plans already independently specified that the Transferred Area would be subject to the same general type of development standards that the Townships had originally envisioned, subject to Haring's ongoing right to amend those standards under Art. I, §6.c. Thus, if the development standards of Art. I, §6.a.2 of the Agreement had evaporated into thin air at that point in time, it would not have made an

[12] *See* Section I of the Statement of Facts, for a detailed discussion of the content of the Haring Master Plan.

ounce of difference to the Townships. That is exactly why – nearly a year after the Agreement was originally adopted – the Townships entered a contractually-binding savings/severability clause, specifically stating that the development standards of Art. I, §6.a.2 are severable if deemed invalid, with the balance of the Agreement remaining valid and enforceable.

I. Amendment of Haring Master Plan

Separate and apart from any provisions of the Agreement, Haring concurrently undertook the statutory process to amend its Master Plan, so as to designate the undeveloped portion of the Transferred Area as being planned for mixed-use PUD development, in accordance with the recommendations of the *Corridor Study*. This process was commenced on February 18, 2014, when the Haring PC adopted a resolution that accomplished the following:

- It ratified and affirmed that the *Corridor Study* shall be applied as the designated land use plan for the Transferred Area, on an interim basis, until such time as the Transferred Area could be incorporated into the 2009 Haring Comprehensive Master Plan; and,

- Authorized and directed the Haring Zoning Administrator to prepare and issue a Notice of Intent to Plan, stating that the Haring PC intends to prepare an amendment to its 2009 Comprehensive Master Plan for the purpose of incorporating the Transferred Area therein, and for the purpose of indicating that the undeveloped portion of the Transferred Area is planned for mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Corridor Study*. Appendix, 511a-514a.

Consistent with this action, the Haring PC adopted, at its March 18, 2014 meeting, a resolution approving proposed provisions for its Master Plan, which would designate the undeveloped portion of the Transferred Area as being planned for mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Corridor Study*, as set forth in Section 422 of the Haring Zoning Ordinance. *Id*., 560a-565a. This was done without input from Clam Lake.

On April 14, 2014, the Haring Township Board approved, for distribution to the Notice

Group[13], the same amending provisions to the Master Plan, designating the undeveloped portion of the Transferred Area as being planned for mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Corridor Study*, as set forth in Section 422 of the Haring Zoning Ordinance. *Id*., 576a-581a. Once again, this was done without any input from Clam Lake.

A public hearing on the Master Plan amendment for the Transferred Area was conducted on July 22, 2014, and was adopted that same date. *Id*., 1087a-1090a. The amendment supplements the Zoning Plan and Future Land Use Map, by planning the Transferred Area for "mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Corridor Study*, as set forth in the regulations that have been adopted in Section 422 of the Haring Township Zoning Ordinance." *Id*.

J. Circuit Court Final Opinion and Order on Summary Disposition

Following the close of discovery, the case was submitted to the circuit court for final decision on counter-motions for summary disposition. On September 19, 2014, the circuit court issued an Opinion and Order on Motion for Summary Disposition, granting final judgment to Plaintiffs and voiding the Act 425 Agreement. *Id*., 25a-40a. In simple terms, the circuit court agreed with Plaintiffs' argument that the Agreement constitutes an impermissible delegation of Haring's legislative zoning authority, by contract. *Id*., 38a. The discrete bases on which the circuit court invalidated the development standards of Art. I, §6 of the Agreement are as follows:

- The circuit court found that Haring is contractually bound by the language appearing at Art. I, §6.a.2 of the Agreement, stating that the undeveloped portion of the Transferred Area "shall be rezoned, upon application of the property owner(s)" to the mixed-use PUD District if "the property owner(s) have submitted an application that complies with the following minimum requirements . . ." The circuit court's opinion was that this language contractually

[13] Under the Michigan Planning Enabling Act, MCL 125.3801, *et seq*., proposed master plan amendments are to be circulated to a designated Notice Group of contiguous communities, for advisory comments, prior to becoming effective.

binds Haring to approve a mixed-use PUD application that complies with the exact same "minimum" mixed-use PUD regulations stated within the Agreement, notwithstanding the fact that the mixed-use PUD regulations stated in the Haring zoning ordinance are materially different. *Id.*, 34a-35a.

- Closely related to the above point, the circuit court suggested that the language appearing at page 17 of the Agreement, stating "where the above regulations are more stringent, the more stringent regulations shall apply," was additional evidence that Haring was contractually bound by the minimum PUD standards of the Agreement. *Id.*, 36a.

- The circuit court rejected the Townships' position that Art. I, §6.c of the Agreement preserved Haring's legislative authority to amend the development standards that could apply to the Transferred Area, holding that such an interpretation would give "no meaning whatsoever" to the preceding 10 pages of development standards. *Id.*, 36a.

- The circuit court rejected the Townships' undisputed intent for Art. I, §6.c of the Agreement, as stated in their concurring resolutions (i.e., that Art. I, §6.c preserves Haring's independent zoning authority to amend the PUD standards), because the resolutions are "parole [sic] evidence" that would conflict with the other provisions of the Agreement. *Id.*, 37a. The circuit court held that the Agreement would need to be amended to "completely eliminate the zoning requirements contained therein" in order to place Haring "exclusively in control of zoning," which the Townships did not do. *Id.*

The circuit court further held that the development standards of Art. I, §6 of the Agreement are not severable. *Id.*, 38a-39a. In support of that holding, the court made the following findings:

- Based on their deposition testimony, the circuit court opined that the members of each Township Board considered the development standards to be "essential" to the Agreement, and considered that the provision of sewer and water service was only "ancillary to that." *Id.*, 36a-37a, 38a-39a.

- If the development standards were severed from the Agreement, this would render the balance of the Agreement fatally non-compliant with Act 425, because Haring could "simply rezone the property to avoid any economic development." *Id.*, 39a.

The circuit court did not definitively address Plaintiffs' other ancillary challenges to other provisions of the Agreement which deal with the Townships' contractual arrangements for sewer/water and indemnity. The circuit court simply held that these other arguments were moot because the Agreement was invalid on other grounds. *Id.*, 39a-40a. But the circuit court nonetheless noted that these other contested provisions "can easily be severed if they are considered illegal or against public policy." *Id.*, 40a.

K. Court of Appeals' Opinion

The Court of Appeals affirmed the circuit court's decision. *Id*., 42a-48a. As a principal matter, the Court of Appeals first held that "Phase II" of the Townships' Agreement, as reflected in at Art. I, §6.a.1 and §6.a.2 thereof, constitutes an unlawful restriction on Haring zoning authority because these provisions require Haring to adopt certain provisions into its zoning ordinance. *Id*., 44a. In so holding, the Court failed to acknowledge the undisputed fact that Art. I, §6.a.2 required Haring to do *nothing*, for reason that Haring had independently developed and had already adopted the exact same standards into its own zoning ordinance, *before* they were incorporated into Art. I, §6.a.2 of the Agreement. The Court of Appeals also held that the language appearing at page 17 of the Agreement (i.e., in section V of the minimum standards), stating "where the above regulations are more stringent, the more stringent regulations shall apply," was an additional contractual restriction on Haring's zoning authority. *Id*., 45a.

Further, while the Court of Appeals expressly acknowledged that Art. I, §6.c of the Agreement grants Haring the independent legislative authority to subsequently amend the zoning for the Transferred Area (*id*., 45a[14]), the Court of Appeals held that this was "irrelevant" because Haring was nonetheless *initially* contractually bound, in Phase II, to adopt the minimum standards listed in Art. I, §6.a.2 of the Agreement. *Id*. Once again, however, the Court of Appeals failed to acknowledge the undisputed fact that Art. I, §6.a.2 required Haring to do *nothing*, for the reason that Haring had independently developed and had already adopted the exact same standards into its own zoning ordinance, *before* they were incorporated into Art. I, §6.a.2 of the Agreement.

With regard to the Townships' secondary argument that the development standards of the Agreement are severable, the court refused to apply the plain language of the Agreement's

[14] In this respect, the Court of Appeals *agreed* with the Townships' interpretation of Art. I, §6.c (i.e., that it allows Haring to amend the zoning for the Transferred Area), and thus rejected the circuit court's contrary opinion. Plaintiffs have not appealed this aspect of the Court of Appeals' decision.

savings/severability clause, and instead relied on the *supposed* testimony of individual Board members (none was cited) as a basis for finding that the development standards were too important to certain individual Board members, to be severed from the Agreement. *Id*., 46a.

Finally, the Court of Appeals held that §6 of Act 425 does not authorize an Act 425 agreement to include provisions by which the parties thereto may agree to the zoning that will be initially applied to the transferred area. *Id*., 46a-48a. The Court instead held that §6 of Act 425 does nothing more than to allow the parties to specify which party will have jurisdiction for certain ordinances. *Id*., 48a.

INTRODUCTION AND SUMMARY OF ARGUMENTS

This is a case, the likes of which the Court has never seen before . . . and which it should never see again, provided that the unprecedented and clearly erroneous analysis of the lower courts is properly reversed and corrected.

As a predicate matter, it is important to know that this is a unique situation where there is no justiciable dispute between the parties to the contract under the Court's review. The Townships – as the only contracting parties to the Act 425 Agreement – have been peaceably and lawfully proceeding under the plain language of contract provisions that, *at an absolute minimum*, are capable of a lawful interpretation, to wit, that Haring is not contractually restricted by the development standards stated in Art. I, §6.a.2 of the Agreement.[15] Moreover, it is *undisputed* that the two Township Boards have unanimously adopted and agreed to that lawful interpretation, to wit, that Haring is not contractually restricted by the development standards stated in Art. I, §6.a.2 of the Agreement. And it is further *undisputed* that the Townships have actually implemented the Agreement in that exact same lawful manner, by which Haring has not been contractually restricted,

[15] As explained above, the plain terms of Art. I, §6.a.2 – *as it was in effect at the time of lower courts' decisions* – did not bind Haring at all. But the lower courts ignored this.

at all, by the development standards stated in Art. I, §6.a.2 of the Agreement. It is *undisputed* that Haring has instead adopted development standards for the Transferred Area that are (i) more lenient than the standards of Art. I, §6.a.2, (ii) more stringent that the standards of Art. I, §6.a.2, and (iii) completely in addition to the standards of Art. I, §6.a.2. And finally, it is *undisputed* that each of the Township Boards, when speaking as a whole (which is the *only* way they can speak[16]), has unanimously and expressly agreed – by binding contract – that the development standards of Art. I, §6.a.2 are to be treated as severable, in the event they are invalidated.

Despite all of this, the lower courts took the unprecedented step of ignoring the undisputed fact that Art. I, §6.a.2 requires Haring to do nothing; ignoring the intent of the parties to the Agreement; and by instead allowing a stranger to the Agreement (that being Plaintiffs) to force a strained and unlawful interpretation on the Agreement, against the will of the actual parties to the Agreement. And the lower courts further allowed that same stranger to dictate what provisions of the Agreement are and are not severable, rather than relying on the undisputed, express contractual declarations of each of the Township Boards who, *as a whole*, had expressly and very specifically agreed that the development standards of Art. I, §6.a.2 were to be treated as severable, in the event they might have been invalidated. This is truly an unprecedented outcome – one which has never been countenanced by a prior opinion of this Court or of the Court of Appeals. It is clearly erroneous.

And to make matters even worse, the lower courts allowed this outcome to be compelled – not just by a stranger – but by a stranger who has no legally protected interest under the Townships' Agreement. In that regard, the only thing the Act 425 Agreement does, insofar as TeriDee's property interests are concerned, is to contractually transfer TeriDee's property from the jurisdiction of Clam

[16] *See*, e.g., *Tavener v Elk Rapids Rural Agr School Dist*, 341 Mich 244, 251-252; 67 NW2d 136 (1954).

Lake to the jurisdiction of Haring for a period of 20 years.[17] Clearly, TeriDee does not like this – it instead wants its property annexed into the City of Cadillac. But TeriDee's admitted displeasure with the jurisdictional situs of its property is irrelevant. This is because the Court long ago held that no individual has a legal right to have his or her property located in a certain municipality or to have his or her property transferred into another municipality. *Midland Twp v State Boundary Comm*, 401 Mich 641, 673-74; 259 NW2d 326 (1977). The lower courts ignored this dispositive law when they allowed TeriDee – as a complete stranger to the Agreement – to challenge and reverse the Townships' undisputed intent for the Agreement.

So how is it possible that we are seeing such strange, erroneous and unprecedented concepts appearing in the lower courts' opinions, whereby strangers, rather than the contracting parties themselves, are allowed to control the interpretation of a contract, even in derogation of its plain terms? The problem is most suspiciously traceable to the jurisprudential cancer that has been spawned by the Court of Appeals' erroneous decision in *Casco Twp v SBC*, 243 Mich App 392, 402; 622 NW2d 332 (2000), *app den*, 465 Mich 855; 632 NW2d 145 (2001).[18] *Casco Twp* is casting a long, dark shadow over the world of Act 425 agreements. As a result of that opinion and the careless dictum included therein, it seems that lower courts are now routinely viewing Act 425 agreements as being presumptively invalid if they interfere with annexation or if they do not allow developers to do exactly what they want to do with their property. The Court of Appeals was not shy about expressing this same type of sentiment at oral argument in this case, where at least one member of the case panel expressly suggested that the Townships' appeal was pointless in light of the SBC's decision

[17] It is true that TeriDee's property also became subject to Haring's zoning ordinance, but that is just an indirect byproduct of *any* type of jurisdictional boundary change, no matter how it occurs, whether by annexation, detachment, conditional transfer or incorporation. Thus, if TeriDee does not like Haring's zoning, its legal claim arises under the Haring Zoning Ordinance, not under the Agreement.

[18] As the Court knows, the Townships are seeking to overturn the erroneous *Casco Twp* decision in the companion appeal they now have pending before this Court, in Docket No. 151800.

that the Agreement was invalid because it does not support TeriDee's specific economic development plan and interferes with annexation.[19]

This needs to stop. The Michigan Legislature has made the intentional policy decision that Act 425 Agreements are *supposed to* interfere with annexation, and thus prevail over annexation, in *every* circumstance where there might be a conflict between these two different types of boundary transfer mechanisms, without any exception. *See* MCL 124.29. Neither a court nor an administrative agency has authority to produce a contrary result. And moreover, there is nothing in Act 425 which states, or even implies, that an Act 425 Agreement, to be valid, must allow landowners to engage in the specific type of development they want. To the contrary, the Legislature has expressly declared that Act 425 agreements are to promote the type of development that would be consistent with the regional land use plan [MCL 124.23(c)], which is exactly what the Townships' Agreement does.

Thus, when this Court irradiates and removes the jurisprudential cancer represented by *Casco Twp* in Docket No. 151800, it should contemporaneously heal the secondary damage that *Casco Twp* has wrought here, as reflected by the unprecedented and strange analysis that produced an erroneous result in this case, whereby the plain language of the Agreement and the undisputed intent of the parties was ignored, in favor of a stranger's private development interests. The Townships' Act 425 Agreement should be recognized as valid, so that the annexation of the Transferred Area is voided.

ARGUMENTS

Standard of Review. The circuit court granted Plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2) , and the Court of Appeals affirmed. The Court reviews *de novo* a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461

[19] The first two pages of the Court of Appeals' written opinion hints at this same type of thinking, whereat the Court of Appeals was careful to identify TeriDee's specific development plan and to selectively quote the allegations TeriDee had made in its Complaint, relating to why having its property transferred to Haring would allegedly interfere with its specific development plans. Appendix, 42a-43a. This was done, even though these allegations have no relevance to the legal issues that were being decided by the court.

Mich 109, 118; 597 NW2d 817 (1999). As sub-issues, this appeal also raises questions of contract interpretation and statutory interpretation, each of which are also reviewed *de novo* on appeal. *Rednour v Hastings Mut Ins Co*, 468 Mich 241, 253; 661 NW2d 562 (2003) (contract interpretation); *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013) (statutory interpretation).

I. THE DEVELOPMENT STANDARDS OF THE ACT 425 AGREEMENT DO NOT UNLAWFULLY RESTRICT HARING'S ZONING AUTHORITY

A. The Townships' Agreement Is Presumed to Be Valid and Constitutional

The gravamen of Count II of Plaintiffs' Amended Complaint is that the Act 425 Agreement is invalid, as constituting an unconstitutional contractual restriction on Haring's legislative authority to zone the Transferred Area. Pls' Amd Compl at ¶¶50-54, 68-73. Within this context, there are certain bedrock principles of contract interpretation that the Court should apply.

As a predicate matter, an Act 425 agreement is prima facie valid under MCL 124.30, and so the burden was on Plaintiffs to show that the Townships' Agreement is invalid. This rule is wholly consistent with the common law. A court is to presume that parties intended to enter a valid and enforceable contract. *Cruz v State Farm Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). And, to give effect to that presumption, the Court is to prefer a construction that renders the contract legal and enforceable. *Id*. Every presumption is allowed in favor of a legal purpose, and a contract will not be adjudicated to be invalid when it is capable of a construction that will make it valid. *Stillman v Goldfarb*, 172 Mich App 231, 239; 431 NW2d 247 (1988). *See* also, e.g, *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 497; 628 NW2d 491 (2001); *Fromm v Meemic Ins Co*, 264 Mich App 302, 306; 690 NW2d 528 (2005); *Roland v Kenzie*, 11 Mich App 604, 611; 162 NW2d 97 (1968). This is not just the Michigan rule of law; it is the same rule applied by the US Supreme Court (*Walsh v Schlecht*, 429 US 401, 408 (1977)), and also by state courts across the county. *See* 17A Am Jur 2d, Contracts, §340. *See* also, *Restatement (2nd) of Contracts*, §203(a).

Despite these rules, the lower courts set sail on a course directly against the legal tide, and

instead indulged in every possible presumption that the Townships' Agreement is invalid. Most significantly, the lower courts applied a novel legal concept that might gently be described as "peculiar," insofar as rules of contract interpretation are concerned. Specifically, the lower courts allowed the interpretation of the Agreement to be controlled by a stranger to the Agreement – a stranger having no third-party beneficiary rights under the Agreement – that being Plaintiffs.[20] And in doing so, the lower courts specifically rejected the interpretation that the parties to the Agreement (i.e., the Townships) have themselves given to the Agreement, which is undisputedly lawful.

In that regard, it is undisputed that the Townships themselves – as the *only* parties to the Agreement – have interpreted the Agreement in a manner that gives Haring the independent legislative authority to determine the content of the development regulations that can be applied to the Transferred Area. And it is likewise undisputed that the Townships have implemented the Agreement in this exact same manner, whereby Haring has amended the mixed-use PUD development standards of its zoning ordinance (which are designated for the Transferred Area) so that they are inconsistent with the development standards of the current form of the Agreement. It is undisputed that Haring's mixed-use PUD provisions contain some standards that are *less stringent* than the development standards of the Agreement; some standards that are *more stringent* than the development standards of the Agreement; and, some standards that are wholly *in addition to* the development standards of the Agreement. For the lower courts to have ignored the contracting parties' lawful intent and interpretation – in favor of an unlawful interpretation being involuntarily imposed on the parties by a stranger – is truly peculiar.

It is peculiar because Michigan law is crystal clear on the point that a court is required to

[20] The Agreement expressly prohibits any third-party rights thereunder: "There are no third party beneficiaries to this Agreement and none are intended." Appendix, 318a (Art. IX). Such a clause is enforceable under Michigan law, and so Plaintiffs have no third-party beneficiary rights under the Agreement. *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 430; 543 NW2d 31 (1995); *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993). That law notwithstanding, Plaintiffs did not even allege that they are third-party beneficiaries of the Agreement.

interpret a contract only in accordance with the ***parties'*** intent. *See*, e.g., *Quality Product & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) (citing *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956)). The cardinal rule of contract interpretation is to ascertain the ***parties'*** intentions, and to that rule, all others are subordinate. *Keller v Paulos Land Co*, 5 Mich App 246, 256; 146 NW2d 93 (1966). Therefore, as a stranger to the Agreement, Plaintiffs do not even have standing to argue that the Townships' interpretation of the Agreement constitutes a breach or improper reading thereof. *First Sec Sav Bank v Aitken*, 226 Mich App 291, 305; 573 NW2d 307 (1997).[21] It is the Townships' interpretation, and their interpretation *alone*, that controls.

That the lower courts failed to abide by these well-established principles of law will become readily apparent to the Court, as the Court considers the plain terms of the Act 425 Agreement, how it was interpreted and implemented by the Townships, and the various bases on which the lower courts incorrectly invalidated the Agreement.

B. The Agreement Specifically Preserves Haring's Independent Legislative Zoning Authority

On the question of whether the Act 425 Agreement has bound Haring to specific zoning action, the trial court record reveals several salient and controlling points, as follows:

- All versions of the Act 425 Agreement (Original, First Amended and Second Amended) preserve Haring's legislative authority to independently determine the content of the zoning regulations that can be applied to Plaintiffs' property.

- The version of the Act 425 Agreement that was in effect at the time of the lower courts' decisions (i.e., as amended by the First and Second Amendment), did not contractually require Haring to do anything with respect to the development standards for the Transferred Area. It required Haring to do *nothing*.

- The version of the Act 425 Agreement that was in effect at the time of the lower courts' decisions (i.e., as amended by the First and Second Amendment), has not bound Haring to take specific zoning action with regard to Plaintiffs' property.

[21] *Overruled on other grounds, Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

> Instead, Haring has exercised its independent legislative authority to amend the mixed-use PUD provisions of its zoning ordinance, so that they are *materially different* than the design standards of the original and amended Act 425 Agreement.

The Townships elaborate on each of these points, in the following sections.

C. The Act 425 Agreement, On Its Face, Preserves Haring's Legislative Zoning Authority

Article I, §6 of the Act 425 Agreement created, on its face, a zoning scheme that established a baseline agreement between the Townships for how the Transferred Area ought to be developed, while at the same time preserving Haring's ongoing legislative zoning authority to determine the final content of the development standards that could be applied to the Transferred Area. As described above in Section C of the Statement of Facts, the Agreement accomplished this through what might be described as a three-phase approach, as follows:

- **Phase I – Zoning Upon Initial Transfer**. Phase I was the initial transfer of the Transferred Area, upon which the residual zoning of the Transferred Area was completely unchanged. It was left subject to the existing FR zoning, as it was already zoned in Clam Lake's jurisdiction, under County zoning regulations. Appendix, 300a (§6.a)

- **Phase II – Baseline Zoning**. In Phase II, Haring was then to (a) rezone the portion of the Transferred Area that is already developed for residential housing to the Haring zoning district that is most comparable to the County FR zoning, so that there would be no effective change in the pre-existing County zoning (*id*., 301a [§6.a.1]), and (b) make "reasonable efforts" to adopt specified mixed-use PUD development standards into its existing PUD zoning district, so that the landowners could apply for rezoning to that district reasonably in advance of the date when Haring was scheduled to extend public sewer and water to the Transferred Area, in the spring of 2015 (*id*., 301a [§6.a.2]; 310-311a [§6.b]).

- **Phase III – Preservation of Authority To Amend**. Phase III constituted a preservation of Haring's legislative authority to *amend* the zoning and/or development standards for

the Transferred Area, any time after Phase II had been completed. This was accomplished by Article I, §6.c of the Agreement, which states as follows:

> "c. After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, **the Transferred Area shall be subject to Haring's Zoning Ordinance** and building codes as then in effect or **as subsequently amended**." *Id.*, 311a (§6.c). [Emphasis added].

As can be seen, the plain language of Art. I, §6.c expressly preserves Haring's independent and ongoing legislative authority to "amend" the zoning regulations that could be applied to any or all portions of the Transferred Area, after the mixed-use PUD standards had initially been adopted in Phase II (i.e., it allows Haring to "subsequently amend[]" the zoning "[a]fter such amendments to the Haring zoning ordinance" had been made). This was done for the specific purpose of ensuring that there would be no restriction on Haring's legislative authority to zone or re-zone the Transferred Area, and/or to amend the mixed-use PUD development standards.

The Court of Appeals agreed with the Townships' position that the plain language of Art. I, §6.c preserves Haring's independent and ongoing legislative authority to "amend" the zoning regulations that could be applied to any or all portions of the Transferred Area. *Id.*, 45a (holding that, under Art. I, §6.c, "Haring may later amend its zoning ordinance over the transferred area."). But the Court of Appeals nonetheless held that this was "irrelevant" because Haring was *initially* contractually bound, in Phase II, to adopt the minimum standards listed in Art. I, §6.a.2 of the Agreement. *Id.* This aspect of the Court of Appeals' decision is clearly erroneous because the undisputed facts show that Art. I, §6.a.2 of the Agreement (i.e., the version in effect at the time of the lower courts' decision) did not require Haring to adopt anything into its zoning ordinance.

As discussed in Section D of the Statement of Facts, a pivotal juncture in the factual history of this case was the Townships' adoption of the First Amended Act 425 Agreement. *Id.*, 428a-443a. As Plaintiffs' counsel pointed out at a couple of the Board member depositions, the legal effect of the First Amendment was to "swap" out and replace the mixed-use PUD regulations of the *original*

Agreement (as stated in Art. I, §6.a.2) with the amended mixed-use PUD regulations that Haring had already independently developed and adopted into its own zoning ordinance, in an exercise of its own legislative zoning authority. *Id*., 937a (Fagerman); 961a (McCain). Timing is everything in this respect.

It is undisputed that the materially-revised PUD regulations had already been adopted by Haring, on September 9, 2013, *before* the time that the First Amended Act 425 Agreement was approved on September 18, 2013 and before the time when it subsequently became effective, on October 21, 2013. Thus, if Art. I, §6.a.2 of the Agreement is construed as requiring Haring to adopt the development standards stated immediately thereafter (as the Court of Appeals held[22]) then Art. I, §6.a.2 of the Agreement required Haring to do *nothing*. Haring had already independently developed and adopted those exact same regulations on its own, *before* the First Amendment took effect, and so Haring was not required to take any new zoning action, at all. This is where the Court of Appeals' analysis falls apart like a house of cards.

It is horn book law a contractual promise to do something that has already been done is invalid, for lack of consideration. *Easley v R G Mortensen*, 370 Mich 115, 120; 121 NW2d 420 (1963); *Shirey v Camden*, 314 Mich 128; 22 NW2d 98 (1946). This is known as "past consideration," and it will not constitute legal consideration for a subsequent promise. *Shirey* at 138. The end game, therefore, is that Art. I, §6.a.2 of the Agreement did not constitute a contractual requirement at all.[23] For this reason, Plaintiffs' challenge to Art. I, §6.a.2 was mooted by the First Amendment, and should have been summarily dismissed by each of the lower courts on that ground.

[22] *Id*., 44a (final para.).

[23] This is to be distinguished from the Agreement as a whole, which has other exchanges of valuable consideration to support its validity.

1. The Court of Appeals Failed to Harmonize Art. I, §6.a.2 and Art. I, §6.c of the Agreement To Reach a Valid Construction

A related plain error made by the Court of Appeals was to focus exclusively on Art. I, §6.a.2 of the Agreement, *in isolation from all other parts of the Agreement*. Specifically, the Court of Appeals held that Haring is contractually bound by the language appearing in Art. I, §6.a.2 to approve a PUD application that complies with the *exact same* mixed-use PUD standards stated within the Agreement, notwithstanding the fact that Art. I, §6.c gives Haring the unilateral authority to amend those standards after they have been incorporated into the Haring zoning ordinance, and notwithstanding the fact that the mixed-use PUD regulations stated in the Haring zoning ordinance are, in fact, materially different than the standards of the Agreement. Appendix, 44a-45a. This was plain legal error.

The Court of Appeals' primary legal error was its failure to recognize that Art. I, §6.a.2 and Art. I, §6.c of the Agreement need to be read together as a complete whole, so as to produce a harmonious result. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51, n11; 664 NW2d 776 (2003); *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 462; 761 NW2d 846 (2008). And when striving for a harmonious result, the lower courts were required to indulge in every presumption in favor of a legal purpose, and to strongly favor a construction that was capable of making the Agreement valid. *Cruz*; *Stillman*; *Universal Underwriters*; *Fromm; Roland*. This, the Court of Appeals clearly did not do; it instead favored an illegal interpretation that was being involuntarily foisted on the Townships' Agreement by a stranger to the Agreement, that being Plaintiffs.

The legally correct interpretation of the Agreement – which the parties to the Agreement themselves accepted and applied – is that Art. I, §6.a.2 of the Agreement needs to be read in conjunction with and harmoniously with Art. I, §6.c of the Agreement, so as to grant Haring the independent legislative authority to amend the mixed-use PUD standards of the Agreement, so that the applicable mixed-use PUD standards that are ultimately reflected in the Haring zoning ordinance

might be different (and *are* different) than those in the Agreement.[24] As such, the "shall be rezoned" language stated in Art. I, §6.a.2 would come into effect only if the property owners submitted a PUD application that fully complied with mixed-use PUD standards, *as then-stated in the Haring zoning ordinance*. And such a requirement is plainly lawful. This is because Haring is already required, by statute, to approve a PUD application that fully complies with the zoning ordinance, as expressly stated in the statutory provisions of the MZEA that specifically pertain to special land uses and planned unit developments. *See* MCL 125.3504(3) ("A request for approval of a land use or activity **shall be approved** if the request is in compliance with the standards stated in the zoning ordinance . . ."). In this respect, agreeing to comply with the preexisting statutory requirement of MCL 125.3504(3) is not a contractual promise at all, because it is horn book law that agreeing to undertake a preexisting statutory duty is not consideration to support a contract. *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 21; 444 NW2d 786 (1989) (quoting 1 Williston, Contracts (3d ed), § 132, p 557); *General Aviation, Inc v Capital Region Airport Auth*, 224 Mich App 710, 715; 569 NW2d 883 (1997). The Court of Appeals failed to apply these well-established principles of Michigan contract law in reaching a contrary conclusion about Art. I, §6.a.2.

That said, even if the Townships were to concede, *arguendo*, that the Court of Appeals had posited one *plausible* interpretation of Art. I, §6.a.2 of the Agreement (i.e., that it binds Haring to apply the "minimum" standards of the Agreement), that interpretation would nonetheless have to be rejected, in favor of the alternative interpretation being advanced by the Townships, which is lawful. This is so because, under Michigan law, a court is required to indulge in every presumption in favor of a contract's legal purpose, and is to strongly favor a construction that is capable of making the a contract valid. *Cruz*; *Stillman*; *Universal Underwriters*; *Fromm; Roland.* Moreover, a court is

[24] Quizzically, the Court of Appeals accepted this interpretation of Art. I, §6.c (Appendix, 45a) but then failed to apply that same interpretation in conjunction and harmoniously with Art. I, §6.a.2, as Michigan law requires.

required to enforce the intention of the parties to a contract (the Townships), not the intent of a stranger having no rights under the contract (Plaintiffs). *Quality Product & Concepts Co*; *Keller*.

All of these binding rules of law point to only one conclusion: the lower courts should have found that the Agreement does not unlawfully bind Haring's zoning authority because Art. I, §6.c expressly preserves Haring's independent and ongoing legislative authority to "amend" the zoning regulations that could be applied to any or all portions of the Transferred Area. This means that Haring – and Haring alone – retains the authority to determine (i) what its mixed-use PUD standards will be, (ii) whether a particular rezoning application is "in compliance with the standards stated in the [Haring] zoning ordinance", as provided by MCL 125.3504(3) and (iii) whether the application "shall be approved" as provided by MCL 125.3504(3). This is the *lawful* intent of the parties to the Agreement, and is the lawful interpretation provided by the plain language of Art. I, §6.a.2 and Art. I, §6.c, *when they are read harmoniously together*, as Michigan law requires. The lower courts should have enforced the Agreement in this same manner; their opinions should be reversed.

2. The Court of Appeals Misread The Agreement

Closely related to the above point, the Court of Appeals held that the language appearing at page 17 of the Agreement, stating "[w]here the above regulations are more stringent, the more stringent regulations shall apply," was additional evidence that the Agreement contractually binds Haring to approve a PUD application that complies with the *exact same* mixed-use PUD standards stated within Art. I, §6.a.2 of the Agreement. Appendix, 45a. This was another instance of plain legal error, stemming from the fact that the Court of Appeals misread the Agreement in a manner that quizzically served to ratify a stranger's interpretation of the Agreement.[25]

The above-quoted language ("[w]here the above regulations are more stringent, the more stringent regulations shall apply") is *not* a substantive provision of the Agreement. Instead, this

[25] Plaintiffs attacked the Agreement on this same ground. Appendix, 193a-195a, 198a.

particular language is a mixed-use PUD standard that Haring had already adopted into its own zoning ordinance, *prior to* the First Amendment to the Agreement. To be more specific, the above-quoted language appears within the final paragraph ("Other") of the roughly nine pages of mixed-use PUD standards that Haring had already incorporated into its zoning ordinance, prior to the First Amendment. *Id*., 442a. The substantive provisions of the Agreement recommence immediately thereafter, at Art. I, §6.b ("b. Haring will use reasonable efforts . . ."). *Id*., 310a. [26] This distinction is subtle, but of great legal importance.

Because the quoted language is not a substantive provision of the Agreement, this language is *not* stating that Haring is contractually bound to apply the more stringent provisions of the Agreement, as compared to what might otherwise be stated in the Haring zoning ordinance. Instead, Haring had independently incorporated the quoted language into Section 422.3(g) of the Haring Zoning Ordinance before the First Amendment had taken effect (*id*., 390a), and that is the *only* place where it has its substantive effect. And that effect is to state that Haring will apply the *mixed-use* PUD regulations *of its own zoning ordinance* in circumstances where those mixed-use standards are more stringent than the *general* PUD regulations that are otherwise stated in Sections 401 through 420 of the Haring zoning ordinance.[27] Correctly read in this manner, Haring is not bound by this language because Haring has the ongoing legislative authority to amend the mixed-use PUD regulations of its zoning ordinance (including Section 422.3(g)), as provided by the plain language of Art. I, §6.c of the Agreement, which the Court of Appeals held is the correct interpretation of Art. I, §6.c. *Id*., 45a. *A fortiori*, Haring has the unfettered discretion to change how stringent or lenient

[26] To aid the Court's understanding on this point, attached in the Appendix is a copy of page 17 of the original Agreement, showing, with a red line, the dividing point where the mixed-use PUD standards of Haring's own zoning ordinance end, and the substantive provisions of the Agreement recommence. *Id*., 329a.

[27] This is a very common type of PUD provision that appears statewide in nearly *every* zoning ordinance, if the ordinance includes a PUD District. Its purpose is to ensure that the special mixed-use PUD standards that apply to this special type of project do not inadvertently create a conflict with the general PUD provisions of the zoning ordinance. It is apparent, however, that the Court of Appeals is not aware of this common practice.

those mixed-use regulations might be, as compared to the standards of the Agreement. In other words, Haring has complete legislative discretion to determine what will or will not be the "more stringent" regulations to be applied to any particular mixed-use PUD application. The Court of Appeals clearly erred in holding otherwise.

In a vacuum, the Court of Appeals' error on this point might be understandable, because the *formatting* of the Agreement is indeed susceptible to fair criticism. Which is to say that a casual reader of the Agreement might not readily recognize the important "break" that exists at page 17 of the original Agreement, between the last of Haring's mixed-use PUD standards ("V. Other") and the substantive provisions of the Agreement that recommence immediately thereafter ("b. Haring will use reasonable efforts . . ."). *Id.*, 329a. Outside of a vacuum, however, the Court of Appeals' error reflects a disconcerting lack of attention to detail. This is because the Townships expressly explained this "break" in its appellate brief. ATs' COA Brief at 29-31 and Exb. 50. For the Court of Appeals to have ignored this "break" suggests that it was searching for ways to invalidate the Agreement, rather than applying the applicable Michigan rules of contract interpretation, which require a court to instead search for and presume a lawful interpretation of an Act 425 Agreement. *Cruz*; *Stillman*; *Universal Underwriters*; *Fromm; Roland.* For this additional reason, reversal is required.

3. The Court of Appeals Read A Requirement Into The Agreement that Undisputedly Does Not Exist

One of most inexplicable errors made by the Court of Appeals was that it read a requirement into the Agreement that simply does not exist. Specifically, it held that the Agreement "prevents Haring from determining how it wishes to rezone the transferred area to accomplish economic development. For example, if Haring wanted to forgo rezoning and apply for a use variance [28] it could not do so." Appendix, 45a (fn1). That statement is a work of fiction, the genesis of which is

[28] The Court of Appeals seemed to be very confused about zoning law when it wrote this footnote. Neither a township nor any other type of municipality "appl[ies] for a use variance." It is *landowners* who apply for use variances for their own land; municipalities do not do this for them.

Plaintiffs' allegations (*false ones*), as the Court of Appeals correctly pointed out. *Id.*

The undisputed intention held by the contracting parties when they adopted Art. I, §6.c was to explicitly ensure that Haring would retain the discretionary authority to determine the zoning standards that would ultimately be applied to the Transferred Area, which could be any other type of rezoning (i.e., something other than mixed-use PUD), and which could conceivably include a use variance, as unlikely as that option might be, given the "undue hardship" standard that must be satisfied for a use variance. And moreover, there is not a single provision in the Agreement stating that the owners of the Transferred Area cannot apply for rezoning to something other than the mixed-use PUD District or that Haring could not approve such an application. Such a provision simply does not exist.[29] This explains why neither the Court of Appeals nor Plaintiffs could identify such a provision. Plaintiffs invented it out of thin air, and unfortunately succeeded in getting the Court of Appeals to uncritically accept this fiction, without actually reading the Agreement to discover that it's a ruse. This plain error is another reason for reversing the lower courts.

4. The Lower Courts Improperly Characterized the Townships' Concurring Resolutions as "Parol"

The circuit court refused to apply or give effect to the concurring resolutions of the Township Boards (*id.*, 459a-462a; 475a-478a), which had confirmed the Townships' joint interpretation of the Agreement, to wit, that the Agreement gives Haring the independent legislative authority to determine the content of the zoning regulations that could be applied to the Transferred Area. At Plaintiffs' specific urging (Brief in Support of Pls' Motion for Summary Disp. at pp. 14-15), the

[29] That said, the Townships are not attempting to be cute about this. The prospect of any other rezoning application being approved (i.e. other than mixed-use PUD) is slim to none, inasmuch as the Haring Board has already made the independent legislative determination that Plaintiffs' property is Master Planned for the mixed-use PUD District. Accordingly, the *substantive merits* of any other rezoning application would be seriously lacking. However, the legal fact remains that Haring is not contractually barred from approving rezoning to some other district. In a nutshell: there is a big difference between (a) being contractually prohibited from doing something and (b) being inclined not to do something for lack of substantive merit. Only the latter situation exists here, not the former, and so there is no contract zoning to be concerned with.

circuit court characterized the concurring resolutions as "parole [sic] evidence" that could not be used to vary the plain meaning of Art. I, §6 of the Agreement. *Id*., 37a. The Court of Appeals agreed, holding that the "extrinsic evidence, such as the concurring resolutions," could not be used to discern the parties' intent under the Agreement. *Id.*, 44a. This was plain legal error.

It is true that the concurring resolutions are physically separate from the Agreement, and are therefore properly classified as *extrinsic* evidence. *See* Black's Law Dictionary, 6th Ed (West 1991). But the rejection of these resolutions as "parol" is legally incorrect because the parol evidence rule cannot be invoked by a stranger to a contract, such as Plaintiffs. *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989). The reason for this rule is plain and simple: the interpretation of a contract is to be controlled only by the *contracting parties'* intent (*Quality Product & Concepts Co*; *Sobczak*; *Keller*), and so a stranger has no business objecting to an extrinsic document on the basis of "parol" or otherwise, in circumstances where the contracting parties expressly agree that the extrinsic document accurately reflects their true intent. *Denha, supra* at 550. *See* also, 30 Am Jur 2d, Evidence, §1031, pp 166-167 (recognizing that a stranger to a contract cannot rely on the parol evidence rule "even where the contract is integrated and unambiguous.").

But the lower courts acted in direct contravention of this rule. The *only* parties to the Agreement (the two Townships) unanimously agreed that their concurring resolutions accurately reflect their intent and the meaning of Art. I, §6.c of the Agreement. This is undisputed; yet the lower courts quizzically allowed a stranger to the Agreement to nullify the concurring resolutions on grounds of "parol" or "extrinsic evidence." This is unprecedented. Michigan's jurisprudence is devoid of any case where an appellate court relied on the parol evidence rule for the proposition that the actual parties to a contract are not allowed to reach agreement about what the contract means and how it should be applied. That would be a very strange case, indeed. The lower courts clearly erred by introducing such a strange and erroneous concept into their decisions.

D. The Act 425 Agreement, As Applied, Did Not Bind Haring's Legislative Zoning Authority

If there was any lingering doubt about whether Haring could or would *exercise* its independent legislative authority (under Art. I, §6.c of the Agreement) to amend the development standards that could be applied to Plaintiffs' property, that doubt was entirely removed in early-2014, when the Haring Board adopted amendments to its mixed-use PUD regulations – amendments that deviated even further from the regulations stated in either the Original or Amended Agreement. This is all undisputed, and is summarized in detail, in Section G of the Statement of Facts,

And with respect to these amendments, the minutes of each Haring PC and Haring Board meeting at which the zoning amendments were considered and adopted reflect that not a single public official from Clam Lake attended or provided verbal or written comment on the proposed amendments. And to the contrary, the minutes of the PC's January 21, 2014 meeting reflect the advice from legal counsel that "Clam Lake concurs in the position that Haring has the right to amend the mixed-use PUD regulations under the Act 425 Agreement, without Clam Lake's approval." Appendix, 446a. Furthermore, as shown in Section G of the Statement of Facts, the revisions that the Haring PC made to the proposed amendments were made in direct response to Plaintiffs' concerns. The Board member depositions further confirm that Clam Lake officials were uninvolved in the process. As a result, one cannot escape the firm conclusion that the Act 425 Agreement, as applied, has not bound Haring to take specific zoning action with regard to Plaintiffs' property.

This is legally significant, because the circuit court allowed discovery to occur for the ostensible purpose of allowing Plaintiffs to evaluate whether "defendants were carrying out the agreement in a way that did not divest [Haring] of its legislative zoning authority." Appendix, 43a. However, despite having allowed Plaintiffs to explore how the Townships had actually *applied* the Agreement, the circuit court's final Opinion gave only terse recognition to the fact that Haring had amended the mixed-use PUD provisions of its zoning ordinance so as to be materially different than

the development standards of the Agreement (*id*., 35a). And the circuit court then rejected the concept that this evidence could be used to support a constitutional interpretation and application of the Agreement (*id*., 35a-36a). In a similar vein, the Court of Appeals held that evidence of how the Townships had actually applied the Agreement was irrelevant to its meaning or the parties' intent. *Id*., 44a. In this particular context, where Plaintiffs' are making a constitutional challenge to the Agreement (i.e., alleging that it unconstitutionally binds Haring's legislative zoning authority), this was a particularly egregious error of law.

It is an egregious error of law because it is well established that constitutional questions are *not* to be dealt with in the abstract; instead, constitutional challenges to governmental enactments are to be considered based on their *application* to the actual set of facts presented to the Court for review. *General Motors Corporation v Read*, 294 Mich 558, 568; 293 NW 751 (1940); *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 342: 675 NW2d 271 (2003); *Lewis v Krogol*, 229 Mich App 483, 490; 582 NW2d 524 (1998). Accordingly, the lower courts should have considered the *undisputed* evidence showing that Haring was *not* bound by the design standards of the Agreement, when Haring actually applied the Agreement and its concurrent zoning authority to the Transferred Area.

E. The Provisions of Art. I, §6.a.1 are Immaterial to this Appeal

The Court of Appeals also took issue with Art. I §6.a.1 of the Agreement, which relates to the zoning to be applied to the already-developed residential portion of the Transferred Area, finding that this provision "clearly contracts away Haring's zoning authority." Appendix, 44a. Admittedly, the Court of Appeals' concern with Art. I §6.a.1 is not wholly without merit, for reason that this provision, *when read in isolation*, could be construed as contractually binding Haring.[30] But this

[30] That said, when Art. I, §6.a.1 is properly read *in context*, with the balance of the Agreement, Haring is clearly not bound by this provision. This is because Haring retains the unfettered discretion, under Art. I, §6.c, to amend the zoning for the already-developed residential portion of the Transferred Area.

point is ultimately irrelevant. The circuit court did not even consider Art. I §6.a.1 when deciding whether the Agreement is valid. And there is good reason for this. The lands that are subject to Art. I, §6.a.1 are not even the lands that Plaintiffs owned or desired to develop when the Agreement was entered. It is therefore doubtful that Appellees had standing to challenge Art I, §6.a.1, and it is likewise doubtful whether the validity of Art. I, §6.a.1 raises a justiciable dispute.

Justiciability problems aside, Art. I, §6.a.1 is immaterial to the Court's decision. It is undisputed that Haring has taken no action to implement Art. I, §6.a.1 (i.e., Haring has not rezoned the land), and so there is no evidence that Haring has been bound by Art. I, §6.a.1, as applied. *Id*., 1074a-1075a. Moreover, even if Haring had rezoned these lands, it would be immaterial, because Haring has an FR District that mirrors the County FR District; the uses that can be permitted almost entirely overlap, and so the same type of zoning would continue in either case. *Id*., 572a; 574a. On top of that, no matter how this property is zoned, the preexisting residential uses have a legal right to lawfully continue. MCL 125.3208(1). The end result is this:

- If Haring does nothing, the lands remain zoned FR and the residential uses can continue.
- If Haring rezones, the lands remain zoned FR and the residential uses can continue.
- If the Court invalidates Art. I, §6.a.1, the lands remain zoned FR and the residential uses can continue.
- If the Court upholds Art. I, §6.a.1, the lands remain zoned FR and the residential uses can continue.

In this context, Art. I, §6.a.1 is not even worth talking about. It is immaterial to the parties to the Agreement, and therefore cannot be invoked as a basis for invalidating the balance of the Agreement. If *any* relief is to be granted with respect to Art. I, §6.a.1, that relief should be nothing more that severing this immaterial provision from the Agreement, as provided by the plain language of the savings/severability clause that is included at Art. I, §6.d of the Agreement, as discussed below in Argument II.

II. IF THE DEVELOPMENT STANDARDS OF THE ACT 425 AGREEMENT ARE INVALID, THEY ARE NONETHELESS SEVERABLE

As demonstrated above, the development standards of the Agreement are valid and enforceable. However, if the Court disagrees, it should nonetheless reverse the lower courts' decisions on the ground that the development standards of Art. I, §6 are severable from the remainder of the Agreement, and that the balance of the Agreement is valid and enforceable.

A. The Severability Clause of the Agreement Should Be Enforced

The Amended Agreement contains a savings/severability provision, specifically declaring that the development standards of Art. I, §6 of the Agreement are severable, if they are declared invalid. Appendix, 483a (§6.d). There is no reason why the Court should not give effect to the plain language of this amending provision. This is because the Boards of each Township unanimously agree that the severability clause accurately reflects the actual intent of the parties to the Agreement. *Id*., 690a-691a (Rosser); 729a-730a (Mackey); 764a (Kitler); 817a (Wilkinson); 848a-849a (Whetstone); 931a (Fagerman); 1017a-1018a (Soule); 1068a-1069a (Scarbrough).

Being reflective of the parties' actual intent, the severability clause should be given full effect by the Court, according to its plain language. *See* 15 Williston on Contracts §45:5.[31] Indeed, the Court is *required* to give effect to the savings/severability clause under the universally-accepted "freedom to contract principle," which requires a court to enforce not only the *original* terms of an unambiguous contract in accordance with the parties' intent, but to also enforce the *amended* terms of an unambiguous contract in accordance with the intent that parties held at the time of the amendment. *Quality Product & Concepts Co, supra* at 370-371. It is the intent of the Townships *at the time of the amendment* that controls the interpretation of the amending provision. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 412-415; 646 NW2d 170 (2002).

[31] "It is well established that whether a contract is entire or divisible is controlled by the intention of the contracting parties . . . In this connection, the intent of the parties as revealed by the express contract terms or language is generally held to the determinative factor in deciding whether a contract is divisible or entire."

Moreover, the Townships had logical reasons for viewing the development standards as being severable, *at the time when the specific savings/severability clause was adopted* (i.e., when the Second Amendment was adopted). Several of the Board members explained at their depositions that, while the development standards were important in the *original* Agreement (which no longer exists in its same form), these standards were no longer a central part of the Agreement by the time they entered the Second Amended Agreement, because Haring had, *by that very late juncture*, already independently developed and adopted mixed-use PUD standards for the Transferred Area that are consistent with the *Corridor Study*, and had already independently adopted Master Plan provisions that designate the Transferred Area for mixed-use, residential/commercial PUD development. Appendix, 693a-694a (Rosser); 762a (Kitler); 818a (Wilkinson); 932a (Fagerman); 1018a-1019a (Soule); 1069a-1070a (Scarbrough). Thus, the same general type of quality development standards would continue to apply to the Transferred Area under Haring's zoning laws and land use plans, regardless of whether the development standards of the Agreement continued to exist or not. *Id*. This rendered the development standards of the Agreement of no importance to the Townships at the very late juncture when the Second Amendment was adopted, thereby making the standards severable.

The lower courts' error in this respect was to focus only on the acknowledgment by certain Board members that the zoning provisions of the original Agreement were important *at the time the original Agreement was first entered*. *Id*., 36a-37a; 46a. There is not really a factual dispute about that. *Id*., 181a.[32] But the world is not a static place; the world did not stop spinning on its axis when the Townships first adopted their *original* Agreement in May, 2013. The world is actually a

[32] The Court of Appeals committed clear error, however, in stating that the Board members considered the development standards to be "of utmost importance." *Id*., 46a. In truth, not a single Board member testified as such, which is made obvious by the fact that the Court of Appeals could not cite to any testimony to support this erroneous statement. *Id*.

dynamic place, where the facts and circumstances materially change over time. And so by the time the Second Amended Agreement was adopted (nearly a year later), along with the Savings/Severability clause of Art. I, §6.d, the facts and circumstances *had* materially changed, so that Haring had already independently adopted zoning provisions for the Transferred Area that are consistent with the *Corridor Study*, and had already independently adopted Master Plan provisions that designate the Transferred Area for mixed-use, residential/commercial PUD development. And so if Article I, §6.a.2 of the Agreement had evaporated into thin air at that very late juncture, it would not have made an ounce of difference, insofar as the development of the Transferred Area is concerned. That property would have been subject to the same general type of development standards and planning recommendations under the Haring zoning ordinance and Master Plan, subject to Haring's right to amend under Article I, §6.c.

The lower courts committed legal error by ignoring these dispositive facts, which were the product of circumstances that had materially changed over the course of the lawsuit. And they compounded that error by incorrectly holding that the parties' intent at the time of the original Agreement controlled (*id*., 36a-37a; 44a, 46a), rather than by correctly holding that the parties' intent at the time of the Second Amendment controlled the interpretation of the savings/severability clause. *Quality Product & Concepts Co*; *Archambo*. Reversal is required, on this additional and independent ground.

B. The Agreement Satisfies Act 425, If Art. I, §6 is Severed

If the development standards of Article I, §6 of the Agreement were severed, the balance of the Act 425 Agreement would still be valid because Art. I, §3 of the Agreement (which Plaintiffs' Complaint *does not even challenge*) independently has the purpose of a planned economic development project, in compliance with Act 425. In that regard, Art. I, §3 of the Townships' Agreement (Appendix, 482a-483a) should be juxtaposed against §1(a) of Act 425, which defines an

"economic development project" as being "planned improvements" that are "*suitable for use by* an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water." MCL 124.21(a) [emphasis added]. Thus, the focus of Act 425 is not on identifying or designating a specific land use or specific development standards. Instead, the statute's focus is on providing specific municipal "improvements," such as municipal sewer and/or municipal water, that *can be used by* an "industrial or commercial enterprise, or housing development" and which will otherwise "protect . . . groundwater or surface water." And that is exactly what Art. I, §3 of the Townships' Agreement does. It *requires* the extension of Haring's public sewer and public water services to the Transferred Area.[33] And the details of how Haring sewer and water are to be extended to the Transferred Area are specified in Art. I, §4(a) of the Agreement, which is another provision that was not found to be invalid by either of the lower courts, and so it too would remain in effect, upon application of the savings/severability clause to the provisions of Art. I, §6. In short, Art. I, §§3 and 4(a) represent a standalone economic development project, in complete satisfaction of Act 425, thus rendering Art. I, §6 superfluous.

And so, if Art. I, §6 was severed, the only difference would be that the applicable design standards to accomplish a mixed-use PUD on the Transferred Area would be specified *only* in the Haring zoning ordinance and Master Plan. But that is a difference without distinction, inasmuch as the development standards of the Agreement and the mixed-use PUD standards that Haring has now adopted into its zoning ordinance are each predicated on the *Corridor Study*, thus resulting in the same general type of development under either scenario. Further, Haring would be required, by

[33] In their own Complaint, Plaintiffs expressly admit that the Agreement "**requires** Haring . . . to provide public wastewater and public water supply services to the Transferred Area for the entire term of the . . . Agreement. *See* Pls'Amd Compl at ¶59 [emphasis added]. This solemn admission in Plaintiffs' pleading is required to be treated by the Court as an admitted fact, which TeriDee cannot be heard to question at any stage in this case, including on appeal. *Monaghan v Pavsner*, 347 Mich 511, 523-524; 80 NW2d 218 (1956).

statutory law, to approve an application for the establishment of a mixed-use, commercial/residential PUD on the Transferred Area if the application was "in compliance with the standards stated in the zoning ordinance, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes," as provided by the plain language of MCL 125.3504(3). As such, the Agreement would stand on its own merits, in satisfaction of Act 425, if the provisions of Art. I, §6 were removed.

The circuit court nonetheless held that the Agreement would be "illusory" if the development standards of Art. I, §6 were severed because (a) Haring's obligation to extend sewer and water to the property is contingent upon the developer "advancing" the costs for those extensions, and (b) Haring would be "at liberty to modify its PUD Zoning Ordinance or even eliminate such a PUD zoning provision in its zoning and afford no opportunity for the property to be developed in any fashion." Appendix, 38a-39a. That reasoning is fatally flawed.

Working in reverse order, the circuit court's speculative concern about Haring possibly modifying or eliminating its PUD zoning provisions in the future is a text-book example of conflicting and self-defeating reasoning. The circuit court opined that an Act 425 agreement cannot have any zoning standards because it would be illegally binding, yet at the same time said that an Act 425 agreement without zoning standards would violate Act 425 because the zoning could be changed to prevent economic development. *Id*., 37a-39a. This failure in reasoning speaks for itself. That aside, the circuit court was just plain wrong about the implications of severing Art. I, §6 of the Agreement. In that instance, Haring would *not* be free to prevent the specified economic development project because Art. I, §3 of the Agreement (which Plaintiffs do not even challenge) would continue to plan for "the construction of a mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Cadillac Area Corridor Study*." In view of Art. I, §3, the Agreement would

continue to plan for the specified economic development project, even without Art. I, §6.

Turning then to the circuit court's concern about the developer advancing the costs for sewer and water extensions, the circuit court was legally incorrect that this somehow invalidates the Agreement or makes it illusory. It is true that the Townships expect Plaintiffs to pay the *upfront* capital costs for the sewer/water extensions.[34] There is no dispute about that. But this does not make the sewer/water provisions of the Agreement "illusory." As has already been demonstrated in the concurrent SBC proceedings that are now pending before the Court in Docket No. 151800, it is undisputed that Plaintiffs will be paying the upfront capital cost for the construction of *any* water/sewer utilities that are extended to their property, whether they come from Haring or from the City of Cadillac. *Id*., 1077a-1078a. But Haring has already demonstrated, by cost study, that Haring utilities are more cost effective than City utilities, when looking at the broader picture of the total costs that would be included with City services. *Id*., 1080a-1081a.

Based on this demonstration, the sewer/water provisions of the Agreement are not illusory, but are instead a central and important part of the Agreement. Consistent with this, a majority of the Board members testified that the extension of Haring sewer and water to the Transferred Area was the principal reason for entering the agreement. *Id*., 617a (Payne); 654a (Rosser); 708a-709a (Mackey); 740a (Kitler); 790a (Wilkinson); 839a-840a, 842a (Whetstone); 864a (Baldwin); 905a-907a, 908a-909a, 912a-913a (Fagerman); 973a-974a (Soule); 1055a (Scarbrough). The lower courts committed clear error when they incorrectly stated that the Board members had testified that the zoning provisions were the "central" provisions of the Agreement, or had the "utmost importance." *Id*., 38a-39a; 46a. That is simply untrue; it is a fabrication that was instigated by Plaintiffs' factually unsupported arguments.

[34] But Plaintiffs would be reimbursed, over time, through a pay-back agreement, as other parties connect to the sewer and water lines. That is why the circuit court referred to Plaintiffs as "advancing" the capital costs.

In summary, in the unlikely event that the Court finds that the zoning provisions of Art. I, §6 of the Agreement are invalid, the Court should nonetheless hold that the remainder of the Agreement is valid and enforceable, as a fully-compliant Act 425 Agreement.

III. THE DEVELOPMENT STANDARDS OF THE ACT 425 AGREEMENT ARE AUTHORIZED BY MCL 124.26(c)[35]

Even if the Court was to find that the development standards of the Agreement bound Haring at the Agreement's inception, this would not invalidate the Agreement because these types of provisions have been expressly authorized by the Legislature under Act 425. Understanding this begins with the predicate recognition that an Act 425 agreement is to be "for the purpose of an economic development project," the implementation of which is *required* to be "***controlled by a written contract*** agreed to by the affected local units." MCL 124.22(1) [emphasis added]. Thus, the Act 425 statute expressly contemplates that a conditional transfer agreement will be a "written contract" that "control[s]" the type of "industrial or commercial enterprise or housing development" (MCL 124.21(a)) that is being planned by the contracting "local units." This necessarily envisions a degree of contractual zoning, for the reason that, under Michigan law, a "zoning ordinance" is the sole means by which a municipality may "regulate land development." MCL 125.3201(1).

Consistent with this interpretation, Section 6(c) of Act 425 expressly states that a conditional transfer contract may include a provision providing for "the adoption of ordinances and their enforcement" by the transferee municipality. MCL 124.26(c). In other words, Act 425 expressly allows the parties to an Act 425 agreement to contractually agree to the adoption and enforcement of certain *zoning* ordinances[36] that will apply to the property being transferred. This is only logical,

[35] This is a novel issue of first impression. Prior to this case, a Michigan appellate court has never considered whether MCL 124.26(c) authorizes anticipated zoning provisions for a conditionally transferred property.

[36] MCL 124.26(c) places no restriction on the types of ordinances to which the parties may agree by contract. It simply uses the unrestricted term "ordinances," which plainly encompasses a zoning ordinance.

because Act 425 agreements often provide (as here[37]) for the reversion of the transferred property back to the transferor municipality, upon conclusion of the agreement. *See* MCL 124.27(d). And so by designating the initial zoning of the property by conditional transfer agreement, this helps to ensure that the transferred property will be developed in a manner contemplated by the transferor municipality when it ultimately reverts back to the transferor's jurisdiction.

This type of legislation is not a unique proposition. The Legislature has authorized other forms of contract zoning through other statutory enactments. For example, MCL 125.3405 authorizes a process by which a landowner can offer conditions as part of a rezoning request, and if the rezoning request is granted, the conditions are thereafter binding on the municipality, and cannot be altered. *See* MCL 125.3405(3). Another form of contract zoning is allowed by MCL 125.3503 and 125.3504, which pertain to the PUD rezoning process. A PUD may be approved by rezoning (MCL 125.3503(7)), and conditions may be imposed on the rezoning when this occurs (MCL 125.3504(4)). The consequence of the PUD process is that the rezoning conditions become contractually binding on the approving authority, and cannot thereafter be altered, except upon the mutual consent of the landowner and the approving authority (MCL 125.3504(5)). Both the conditional rezoning process and PUD rezoning process have been recognized as valid forms of contractual rezoning by the Court of Appeals. *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239; 792 NW2d 781 (2010) (enforcing PUD rezoning agreement as a binding contract); *Wesley & Velting, LLC v Village of Caledonia* (unpublished), No. 278264 (Mich Ct App, Oct. 2, 2008) (Appendix, 1095a) ("MCL 125.3405, by its plain language, provides a mechanism for contractual zoning . . .")[38]. Thus, there is nothing special about the fact that the Legislature has authorized another valid form of contract zoning under Act 425 – it has repeatedly done so in other appropriate

[37] Appendix, 313a (§17.a).

[38] The Townships cite an unpublished opinion on this subject because there is no published authority interpreting MCL 125.3405. *See* MCR 7.215(C)(1).

circumstances.

And it is worth pointing out that Plaintiffs, through their own conflicting and self-defeating arguments, have tacitly acknowledged that Act 425 does, in fact, allow a form of contract zoning. Specifically, Plaintiffs have repeatedly taken the position that an Act 425 Agreement, to be valid, *must* identify a very specific land use [Pls' Supp. Brief (8/14/14) at p. 3], such as, for example, "hotel and convention center." That position is legally incorrect.[39] Nonetheless, accepting for a moment the proposition that an Act 425 agreement *could* lawfully be that specific (even though it is not required to be that specific), this is completely contradictory with Plaintiffs' concurrent position that an Act 425 agreement can have no binding effect on the zoning authority of the transferee municipality. The contradiction lies in the fact that, if an Act 425 agreement identifies a specific land use, it necessarily follows that the transferee municipality *must* amend its zoning ordinance to allow that same specific land use, or else the economic development project would be impossible. So, out of one side of their mouth, Plaintiffs demand that the Townships' Agreement contractually bind Haring to permit a very specific land use in order not to be illusory. But out of the other side of their mouth, Plaintiffs effectively argue that the Agreement would be invalid if a specific land use is named because that would necessarily bind Haring to adopt a very specific zoning ordinance amendment that would allow that very same specific use. Plaintiffs cannot have it both ways.

This is the exact same type of legal error the circuit court made in its final decision, in which it contradictorily stated that the Townships would need to remove the Agreement's zoning provisions in order not to unlawfully restrict Haring's zoning authority (Appendix, 37a), but yet simultaneously stated that removal of the zoning provisions would render the Agreement non-compliant with Act 425, for failure to promote an economic development project (*id.*,39a). The

[39] Section 1(a) of Act 425, MCL 124.21(a), defines a lawful "economic development project" very generically, as including "improvements, or structures suitable for and intended for or incidental to use as an industrial or commercial enterprise or housing development." Thus, nothing more specific is required.

circuit court cannot have it both ways either. As explained above, the circuit court's final decision advances an illogical position that would create a nonsensical world in which *every* Act 425 Agreement would be invalid: it would either be unlawfully binding or illusory. This is not the law. As MCL 124.26(c) makes clear, the parties to an Act 425 agreement are permitted to specify the adoption of *initial* zoning ordinance provisions in their contract, as long as the right to subsequently amend is retained, as the Townships' Agreement expressly does, under Art. I, §6.c. For this additional reason, the Townships' Agreement is valid and enforceable.

CONCLUSION AND REQUEST FOR RELIEF

The lower courts were all-too-eager to find a way to invalidate the Townships' Agreement, and consequently made a multitude of clear legal errors. Most significantly, they ignored the plain language of the Agreement; they ignored the fact that Art. I, §6.a.2 requires Haring to do nothing; they ignored the lawful intent and actions of the contracting parties; and instead involuntarily foisted a strained and illegal interpretation on the Agreement, at the urging of a stranger. This was done in contravention of well-established principles of Michigan law that presume and favor a lawful interpretation of the Agreement. This improper action cannot be sustained. The Townships therefore respectfully request that this Honorable Court reverse the lower courts' decisions in all respects, hold that the Agreement is valid and enforceable; hold that annexation of the Transferred Area is void; and, hold that the Transferred Area has been continuously within Haring's jurisdiction since June 10, 2013, when the Townships' Act 425 Agreement became effective.

Respectfully submitted,

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